Covad suggests that for SORD (or Ameritech equivalent) access, the Commission should simply order SBC-Ameritech of offer direct access to SORD in the manner requested by CLECs. No additional conditions, contingencies, limitations, or logical misstatements need be made. If the Commission feels that CLEC/SBC-Ameritech contracts are necessary, the 30-month timeline for access to SORD (or equivalent) must be tolled accordingly. Otherwise, SBC-Ameritech could simply drag negotiations and development efforts on for months – and these delays would merely cut into the time in which CLECs would have access.

4. Summary of Covad Position on OSS "Enhancements" and Interfaces.

In general, Covad does not believe that these OSS "enhancements" will be very useful in accelerating competitive entry unless the Commission takes several steps. Covad is also concerned that the lengthy timelines and severe limits on CLEC participation will provide SBC-Ameritech with a convenient "excuse" for the next two years to continue their non-compliance with their obligation to provide nondiscriminatory access to OSS. At a minimum, the Commission should –

- Toll the expiration of all of the merger conditions (36 months) until all of these OSS enhancements and interfaces are actually developed and deployed;

- Deny the SBC-Ameritech separate data affiliate from using any direct access to SORD (or equivalent databases) and Complex Product Service Order System (CPSOS) until the improvements required by Paragraph 16 are fully implemented. In the meantime, the affiliate must place all orders through existing OSS available to CLECs. In the meantime, the affiliate may not employ any SBC-Ameritech personnel that works for the SBC-Ameritech "ILEC arm" who might have access to SORD (or equivalent) and CPSOS in the course of their "ILEC" work. This condition would ensure swift and speedy compliance with these OSS conditions.

- Expressly permit CLECs to enforce SBC-Ameritech compliance with this condition in (at the CLEC's option) a truly independent AAA arbitration, in state or FCC complaints, in interconnection agreement arbitrations, or in any court of competent jurisdiction. A finding by any of the above that SBC-Ameritech was not in compliance would re-start the 36-month clock of the merger condition from the date that SBC-Ameritech comes into compliance.

D. Waiver of OSS Charges (Proposed Condition IV)

As announced by the FCC, the June 29 Condition No. 7 clearly states that "SBC-Ameritech will not charge competitors for access to SBC-Ameritech's electronic OSS." There are no caveats associated with that statement.

SBC-Ameritech July 1 proposal (Paragraph 18) does not meet this expectation and is entirely inconsistent with June 29 Condition No. 7. Indeed, Paragraph 18 clearly states that SBC-Ameritech may collect "the costs of developing and providing OSS through the pricing of UNEs or resold services."

"Not charge" means "not charge." It does not mean, "Pay me in some other manner on some other date." SBC-Ameritech's proposal is indicative of the corporate attitude these companies described above in Section I.C – prior promises mean nothing.

The Commission can restore the original promise by deleting the last sentence of Paragraph 18 in its entirety.

E. OSS Assistance for Small CLECs (Proposed Condition V)

More evidence of SBC-Ameritech lawyers running amok can be found in the final sentence of Paragraph 19(a). This sentence anticipates that SBC-Ameritech intends to examine and actively dispute the sufficiency of a small CLEC's SEC filings (or "other documents mutually agreeable") with regard to the CLEC's annual revenues before SBC-Ameritech will fulfill its obligation to provide special "OSS assistance" to that small

CLEC. In short, SBC-Ameritech wants to preserve the right to audit a CLEC's finances at will before providing the OSS assistance it promises to provide.

Covad also objects to the last sentence of Paragraph 19(a) because it would require that a state commission enforce a FCC Merger Condition. The Commission should enforce its own conditions and not require state commissions to spend their limited resources tracking down and verifying a small CLEC's financial statements at the arbitrary whim of SBC-Ameritech.

Finally, the Commission should note that Paragraph 19(c) would only require SBC-Ameritech to "identify and develop training and procedures" that would benefit small CLECs. Paragraph 19(c) would *not*, interestingly, require SBC-Ameritech to "implement" those procedures.

F. Advanced Services Conditions (Proposed Conditions VI and VII)

Covad strongly supports requiring SBC-Ameritech to provide xDSL services through an advanced services affiliate that must go through the same hoops and hurdles that Covad and other CLECs face. In Covad's opinion, the advanced services affiliate will provide far more incentive for SBC-Ameritech to develop OSS, collocation and unbundled element provisioning processes that actually "work" than all the other commitments in the July 1 Proposal combined. If implemented properly, the separate affiliate proposal would confer substantial public interest benefits. Indeed, Covad urges that the Commission consider applying this regulatory paradigm to all incumbent LECs in the *Advanced Wireline Services* proceeding, CC Docket No. 98-147.

That said, Covad is disappointed with several aspects of the SBC-Ameritech proposal to implement June 29 Condition No. 1. In several instances, SBC-Ameritech

have proposed that its separate affiliate be granted special rights and privileges from the SBC-Ameritech ILECs that would, in Covad's opinion, provide that affiliate an immediate and sustainable competitive advantage. This is not what structural separation for advanced services is about, and these proposals are inconsistent with the general principle announced by Commission Staff on June 29, 1999 that SBC-Ameritech's ILEC arms "will treat the affiliate as they would any competitor" (June 29 Condition No. 1).

1. DSL Line Sharing Must Be Made Available Immediately to CLECs

SBC-Ameritech's proposal (¶¶ 33-34) to grant its separate affiliate "exclusive" access to DSL line sharing[19] for an unspecified period of time is fundamentally inconsistent with the concept of structural separation for SBC-Ameritech advanced services. The principle of structural separation is relatively simple – the separate affiliate is to be treated the same as unaffiliated providers like Covad. Thus, once the separate affiliate is in place, if the separate affiliate has access to DSL line sharing with the SBC-Ameritech ILEC arm, then data CLECs like Covad must also have access to DSL line sharing with the SBC-Ameritech ILEC arm. If data CLECs like Covad do not have access to DSL line sharing, then the separate affiliate must not have access to DSL line

[19] "Line sharing" is the practice in which a high-speed DSL data service (up to several megabits per second) can be provided over the same loop as analog voice service. Analog voice service occupies the frequency band of 0-4 kHz on a customer's copper loop; particular forms of DSL (such as ADSL) are designed to occupy higher frequency bands without interfering with the analog voice band. *See* Comments of Covad Communications Company, CC Docket No. 98-147, June 15, 1999. The ability to provide DSL over shared lines presents a considerable competitive advantage to incumbent LEC DSL services. Because the loop is already "paid for" by the analog voice service, ILEC DSL tariffs do not (at this time) contribute any cost to installing and maintaining the outside plant loop facility. Thus, ILEC DSL services that utilize line sharing get "free loops." CLECs have been denied line sharing and can only provide DSL service by ordering and obtaining a separate, "stand-alone" loop that costs upwards of $20 per month. In addition, facilities are not always present for the CLEC to obtain this stand-alone loop. Indeed, line sharing with an existing loop used for analog service is the *only* economical way of providing DSL service to many consumers (5-10%, based on Covad's experience in Ameritech territory).

sharing. There is no room in the principle of structural separation to provide "exclusive" access to a method of providing DSL service to consumers to the SBC-Ameritech affiliate for any period of time. If this means that the separate affiliate cannot sign up new line sharing customers and must to migrate all existing line sharing customers to "stand-alone" second lines, so be it. That is what structural separation is all about.

Indeed, if the Commission adopts conditions that permit the SBC-Ameritech affiliate to have any "exclusive" access to DSL line sharing, it would adopt an expressly discriminatory policy. This outcome directly contrary to Title II and Section 251 of the Act, would be highly detrimental to competition in the advanced, xDSL services market, and would clearly be arbitrary and capricious.

The Commission can resolve this issue by taking one critical step prior to taking action in this proceeding: issue final regulations in CC Docket No. 98-147 requiring ILECs to provide nondiscriminatory access line sharing to CLECs immediately. Most of the issues Covad has with Paragraphs 33 and 34 result *directly* from the fact that the SBC and Ameritech seem to assume that their merger will be acted on prior to the Commission's line sharing decision in CC Docket No. 98-147. While the focus upon "interim" measures in this merger proceeding pending this final decision is laudatory, the serious competitive complications surrounding these interim measures will be commensurately lessened if the Commission implements final DSL line sharing rules in conjunction with its review of this merger.

a. Availability of DSL Line Sharing is Improperly Conditioned and Limited (¶ 33).

Paragraph 33 states that SBC-Ameritech will only provide line sharing once "it becomes technically feasible . . . in a manner that permits multiple CLECs" to have such

access and once "the equipment to provide such line sharing becomes available, based on industry standards, at commercial volumes." SBC-Ameritech do not indicate who would make those determinations. After those thresholds are made, SBC-Ameritech state, without explanation, that they will phase-in their compliance between 3-12 months.

These restrictions are improper and make little sense. Indeed, SBC-Ameritech presume that line sharing is *not* technically feasible (directly contrary to the Commission's tentative conclusion in the *Second Advanced Wireline Services Order and Further Notice*) and that it need not provide line sharing until other threshold determinations are met. SBC-Ameritech's proposed thresholds (a determination of feasibility and that the equipment to provide line sharing is "available, based on industry standards, at commercial volumes") essentially would have this Commission engage in another proceeding *before* CLECs be treated equally with the SBC-Ameritech advanced services affiliate. And once that proceeding is completed, SBC-Ameritech will take up to one year to phase-in the availability of DSL line sharing. During this time, the SBC-Ameritech affiliate will enjoy "exclusive" access to DSL line sharing from SBC-Ameritech ILEC affiliates (¶ 34).

In addition, the proposal presupposes that DSL line sharing capability will be made available in accordance with rates, terms and conditions determined by State commissions. Covad does not believe that this assumption is necessarily sound – SBC's retail ADSL service, which employs DSL line sharing, is regulated as an *interstate* telecommunications access service, and Covad has proposed that DSL line sharing be made available as an interstate access service under rates, terms and conditions

established by the FCC.[20] As a result, the Commission's final line sharing rules may simply require the filing of federal tariffs for these rates, terms and conditions.

Of course, the complicated competitive issues presented by these proposed limitations would disappear if the Commission issues final DSL line sharing rules in CC Docket No. 98-147 prior to or on the same date as it releases an order in this merger proceeding.

b. Other Issues Surrounding Interim Line Sharing Proposal.

The proposal to provide CLECs with a form of "Interim Line Sharing" while final DSL line sharing rules are written and implemented presents several additional issues. "Interim Line Sharing" is a misnomer, perhaps, because it would not provide CLECs with DSL line sharing capability but would simply provide CLECs with less-expensive, stand-alone loops until "final" DSL line sharing is offered.

The SBC-Ameritech Separate Affiliate Will Enjoy Exclusive Access to DSL Line Sharing during the Interim. While CLECs are given discounts on stand-alone loops during this time period, the SBC-Ameritech affiliate will have "exclusive" access to DSL Line Sharing, in which it can place its DSL service "on top of" an existing loop.

This is a critical distinction because oftentimes a "spare" loop is not available on an economical basis to a particular household.[21] Because Interim Line Sharing still requires the CLEC to procure (and pay the nonrecurring charge for installing) a separate,

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[20] *See* Comments of Covad Communications Company, CC Docket No. 98-147, filed June 15, 1999.

[21] Covad noted in its June 15, 1999 Comments in CC Docket No. 98-147 that such "no facilities" occur routinely in its deployment. In Ameritech territory, 5-10% of Covad's orders require several thousand dollars of "special construction" to provide a new, stand-alone loop. The SBC-Ameritech affiliate would not face this similar limitation because line sharing permits it to place DSL service "on top of" an existing loop to a customer premises that already supports analog voice service.

stand-alone loop, the Interim Line Sharing proposal does not assist CLECs like Covad in offering service to these unfortunate consumers, which represent up to 5-10% in Ameritech's region. As a result, during this "interim" period, the SBC-Ameritech affiliate would have a significant competitive advantage in providing service – because for this entire class of consumers, the SBC-Ameritech affiliate would the *only* carrier capable of providing xDSL service to these households.

At-Will CLEC Audits would Chill Entry. The Interim Line Sharing proposal would subject Covad to an at-will "audit" by SBC-Ameritech to ensure that Covad was not using an Interim Line Sharing loop to provide "voice grade service." The proposal also includes a "Death Penalty" provision that would deny access to Interim Line Sharing if the CLEC were found to have violated this use restriction (¶ 34(d)-(e)). Not only is the concept of a use restriction wholly inconsistent with Section 251(c)(3) of the Act (which permits a requesting carrier to use UNEs to provide *any* "telecommunications service"), giving SBC-Ameritech the unilateral and intrusive power to inspect a CLEC's network configuration and records at-will is unnecessarily burdensome. SBC-Ameritech would be able to use this audit process strategically to create a strong disincentive for CLECs to take the Interim arrangement or even to target, punish or threaten certain CLECs.

No Provisions to Transfer "Interim Line Sharing" Customers to "Final Line Sharing" Customers. The proposal does not seem to contemplate any "transition" from Interim line sharing to "final" line sharing. If CLECs sign up customers on stand-alone loops pursuant to Interim Line Sharing and "final" line sharing later becomes available, will CLECs be forced to "convert" those Interim customers or will those Interim customers be "grandfathered"? Requiring a conversion would entail needless cost and

disruption of service to these customers. In addition, grandfathering Interim customers raises its own pricing issues – will CLECs still be permitted to pay the interim rate for those stand-alone loops, or will the rate go up to the standard, stand-alone loop rate?[22]

These transition issues will only be faced by CLECs, because the SBC-Ameritech affiliate will not be acquiring stand-alone loops pursuant to the "Interim Line Sharing" arrangement. This result is discriminatory in its competitive impact – as proposed, CLECs signing up "interim line sharing" customers will face an uncertain future prices and possible, unnecessary conversions in the future. The SBC-Ameritech affiliate will be able to market and sign up customers during this interim period free of these concerns.

c. Summary: Immediate Nondiscriminatory Access to Line Sharing is Needed

Covad believes that the *best* solution to the issues surrounding the "interim line sharing" period is, simply, not to have one. Covad believes that the Commission should issue final rules on DSL line sharing in CC Docket No. 98-147 prior to or when it issues an order in this proceeding.

Absent that action, the Commission should ensure that the SBC-Ameritech advanced services affiliate not have a competitive advantage during the interim period. If the Commission does not take such action and instead permits the separate affiliate to have exclusive access to DSL line sharing, that decision would be arbitrary and

[22] It is important to resolve these issues up front, before CLECs like Covad decide whether to recruit customers for service using Interim Line Sharing. Covad believes that the transition from Interim to final line sharing should not disrupt customer service at all. When "final" line sharing becomes available (defined as the date on which the final rates, terms and conditions are established and when line sharing is actually available for ordering and provisioning by SBC-Ameritech), CLECs with Interim Line Sharing customers will be given two choices, at no charge to the ILEC. The CLEC could choose to grandfather those lines, but pay the same monthly rate for that loop as it would for "final" line sharing. The CLEC could choose to convert the customer to a "stand-alone line" DSL service (such as SDSL) and pay SBC-Ameritech from that point forward the stand-alone monthly UNE loop rate.

capricious, because the decision would be wholly inconsistent with the entire concept of the separate affiliate. To avoid this result, if the Commission does not adopt final DSL line sharing rules prior to or on the date it issues an order in this merger proceeding, Covad proposes that the following changes be made to Paragraphs 33 and 34:

- The first sentence of Paragraph 33 should be changed to read as follows:

"If SBC/Ameritech incumbent LECs offer and provide line sharing to the separate Advanced Services affiliate(s), the SBC/Ameritech ILECs shall offer and provide line sharing to unaffiliated providers of Advanced Services. Such line sharing capability will be provided by SBC/Ameritech's incumbent LEC in all states at rates, terms and conditions consistent with current and future FCC and state rules and regulations, and will be offered in a non-discriminatory manner to both the separate Advanced Services affiliate and unaffiliated providers. Until such time as SBC/Ameritech ILECs offer and provide line sharing to unaffiliated providers of Advanced Services, SBC/Ameritech LECs shall be prohibited from providing line sharing to the separate Advanced Services affiliate(s)."

- Paragraph 34 also should be changed to prohibit the advanced services affiliate from obtaining any access to any line sharing until CLECs are given nondiscriminatory access to line sharing.
- Until line sharing is available pursuant to Paragraph 33, Interim Line Sharing over stand-alone loops will be available to both CLECs and the advanced services affiliate on the rates, terms and conditions listed in ¶ 34(b). Interim line sharing customers signed up with separate, stand-alone loops during the interim period by both the affiliate and CLECs would be grandfathered at the final line-sharing rate; no conversions to "actual" line-sharing would be required.

- The advanced services affiliate will be subject to the same interim use restrictions, audit, and "Death Penalty" requirements. CLECs would have the same right (individually or collectively) to audit compliance by the advanced service affiliate pursuant to of ¶34 (c)-(e).

Covad believes that these proposed changes would help remove the inherent competitive advantage SBC-Ameritech have built into Paragraph 34. However, Covad still believes that the best solution would be for the Commission to issue final, DSL line sharing rules prior to or at the same time as an order in this merger proceeding.

2. The Proposed DSL Loop Conditioning Charges are Discriminatory and Unlawful (¶ 24)

SBC-Ameritech propose to implement "uniform rates for conditioning xDSL loops." These rates, contained in Attachment C, are atrocious – amounting to $1580 to remove bridged taps and load coils from a single loop. These charges essentially make it cost-prohibitive for data CLECs to provide service to a significant number of consumers. As a result, a significant number of potential customers would be denied the benefits of competitive entry *immediately* by these discriminatory and unreasonably high prices. As proposed by SBC-Ameritech, this condition would not present *any* public interest benefits and instead would be directly harmful to the public interest.

The June 29 FCC Staff Condition No. 3 contemplated that SBC-Ameritech would offer "uniform, cost-based rates for conditioning xDSL loops." SBC-Ameritech's July 1 proposed conditioning charges (Attachment C to July 1 Proposal) do not come close to this standard. Indeed, the rates are discriminatory and unlawful for several reasons: (1) assessing per-loop, actual conditioning charges on CLECs is plainly inconsistent with the

Commission's TELRIC pricing rules; (2) the proposed rates are inconsistent with actual rates paid for conditioning services in SBC and Ameritech service territories; and (3) as proposed by SBC-Ameritech, the rates are not even based upon "actual" costs.

a. Per-Loop Conditioning Charges are Inconsistent with FCC Pricing Rules.

Under the Commission's TELRIC pricing rules, there should be *no* charge for conditioning an xDSL loop. These UNE pricing rules require that the prices of these elements be set equal to Total Element Long Rune Incremental Cost (TELRIC) plus a reasonable proportion of the efficient, forward-looking "shared and common" costs the ILEC would incur to provide all of the products and services it provides. Commission rules promulgated in the *First Local Competition Order*[23] that TELRIC should be calculated "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers."[24] The Commission also decided that a TELRIC methodology may not consider embedded costs (a cost "incurred in the past"), retail costs, opportunity costs, or revenues to subsidize other services.[25] Finally, the Commission ruled that a TELRIC unit cost (i.e., the price of one loop) must be "divided by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the

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23 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*First Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part and aff'd in part*, __ U.S. ___ (Jan. 24, 1999).

24 47 C.F.R. § 51.505(b)(1).

25 47 C.F.R. § 51.505(d).

total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period."[26] These rules were upheld by the U.S. Supreme Court on January 24, 1999 and are currently the law of the land.

These principles compel the outcome that CLECs may not be required to pay DSL loop conditioning costs on a loop-by-loop, actual cost basis. SBC-Ameritech's proposal would instead require CLECs to pay the *actual* cost of modifying its embedded loop plant facilities dedicated to a particular customer in any circumstance in which that plant includes equipment or arrangements (such as bridge taps or load coils) that impede the availability of DSL services.

As a result, Paragraph 24 and Attachment C assume an SBC-Ameritech network in which repeaters, bridged taps and load coils exist and that must therefore be removed. That assumption is fundamentally incompatible with the assumption mandated by current FCC rules that require UNE rates to be established by reference to a forward-looking, least-cost, most efficient technology telecommunications network. In this network, bridged taps, repeaters and load coils may not exist.

The Commission has already addressed the question as to whether a forward-looking, most efficient telecommunications network design includes this equipment. The Commission's guidelines for universal service cost studies explicitly *prohibit* the inclusion of such equipment in a forward-looking economic cost study of the network – on the basis that loops configured with such equipment do not provide universal access to advanced services.[27]

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[26] 47 C.F.R. § 51.511.

[27] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order at ¶ 250(1) (May 8, 1997).

Several state commissions have come to similar conclusion and ruled that conditioning charges or "special construction charges" are inconsistent with a TELRIC methodology. Earlier this year, the Michigan Commission ruled that the costs of adding or removing this equipment were already taken into account in Ameritech's TELRIC cost study in that state. The Texas Commission adopted a TELRIC study in 1997 that reflected the full forward-looking economic cost of a network design that did not include components such as load coils that interfere with DSL service and ruled that assessing per-loop conditioning costs were not proper.[28] A recent interim order by the California Commission rejected SBC's attempt to impose per-loop DSL loop conditioning charges on CLECs. The California Commission ruled that it had adopted cost studies based on a "forward looking" network and that "it makes little sense to model one type of network for unbundled elements and then assume a different network exists for ordering and provisioning the same elements."[29]

As a result, *any* assessment of a charge for removing a load coil on a particular loop would constitute double-recovery of the forward-looking economic cost of implementing a load-coil-free forward-looking network design. This Commission *cannot*, by definition, permit SBC-Ameritech to levy non-recurring, actual cost per-loop charges for "conditioning" on CLECs that purchase UNEs at TELRIC-based prices. If the Commission does so, it would arbitrarily turn its back on its established pricing rules.

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[28] *See* Arbitration Awards in Consolidated Docket Nos. 16189, *et al*, Appendix A, Issue No. 148 at 6 (Tex. P.U.C. Dec. 19, 1997).

[29] Cal. Pub. Utils. Cssn. Decision 98-12-097, Dockets R.97-04-003/I.93-04-002 at 34 (Dec. 17, 1998).

b. The Proposed Conditioning Charges are Inconsistent with what CLECs Currently Pay in SBC and Ameritech States.

In California, Covad does not pay SBC *any* charges for conditioning services at present, pursuant to orders by the state commissions and Covad's interconnection agreement with SBC. In addition, Covad does not pay GTE any conditioning charges in California pursuant to Covad's interconnection agreement. In Ameritech states, Covad's interconnection agreements (similar to most Ameritech agreements) do not even mention "conditioning charges" that are to be assessed on DSL-capable loops.[30] And, as discussed above, the Michigan Commission recently ruled that assessment of per-loop charges for digital loop conditioning is inconsistent with TELRIC pricing principles.

Because many SBC and Ameritech states have adopted lower (or no) conditioning rates, the proposed conditioning charges are far from the "uniform" proposal contemplated by FCC Staff in June 29 Condition No. 3. Instead, the proposed charges in Attachment C are expressly discriminatory – certain CLECs operating in Illinois, Kansas, and Missouri will face radically different conditioning charges than CLECs operating in California and Michigan. SBC-Ameritech's proposal to assess over $1500 per loop to remove bridge taps and load coils is, therefore, far from a "uniform" interim proposal – a truly "uniform" region-wide conditioning charge would be zero.

For CLECs with interconnection agreements that do not provide for conditioning charges or which explicitly state that no charge will be assessed for conditioning any particular loop, Paragraph 24 and Attachment C are particularly troubling. If Paragraph 24 and Attachment C become an effective merger condition, Covad is concerned that

SBC and Ameritech will utilize this condition and the resulting cost-study it must file with every state to impose new charges on CLECs for conditioning. SBC-Ameritech could then seek to invoke the "change in law" clauses of currently-effective agreements to jack up the rates on CLECs that deploy xDSL services. The Commission must not permit itself to be used in this fashion and should soundly reject this insidious action.

c. The Proposed Charges are Discriminatory and not Cost-Based.

To add insult to injury, the rates proposed by SBC-Ameritech in Attachment C are not even consistent with the charges for conditioning present in SBC's federal ADSL tariffs. SBC's federal ADSL tariffs charge a customer $900 for the removal of all bridged taps and load coils on a loop,[31] while the removal of bridged taps and load coils on a loop under Attachment C would cost the CLEC $1580. What is clear from this demonstration is that SBC and Ameritech have not put much, if any, thought into the interim rates in Attachment C. The proposed interim rates simply cannot be cost-based. For this reason alone, these interim rates should be rejected by the Commission.

In addition, the high per-loop costs seem to contemplate a very inefficient means of maintaining outside plant. A load coil can load from 100 to 1500 copper pairs, and it is standard and efficient practice that when a technician is dispatched to remove a load coil for a particular loop, the technician will remove at least an entire 25-pair or 50-pair

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[30] As described above and shown in Attachment 2 to these Comments, Ameritech is improperly attempting to insert a clause requiring CLECs to pay conditioning charges as a condition of amending interconnection agreements to permit CLECs to order cageless physical collocation.

[31] *See, e.g.*, SWBT Tariff F.C.C. No. 73, Sections 14.7.3(A)(2) (conditioning "may include, but is not limited to, the removal of load coils, bridge taps and/or repeaters"); 14.7.4(A)(B) (all conditioning activities will be performed for $900 per line).

bundle within a binder group – regardless of the number of DSL-capable loops that a new entrant orders from that group.[32] As recently shown by a study by Economics and Technology, Inc., CLECs have been more likely to enter the market for DSL services before ILECs decide to deploy DSL.[33] As a result, CLECs, since they are the "first mover" will generally face these excessive conditioning costs before the ILEC enters the market. Since the SBC-Ameritech proposal charges the "first mover" the cost of removing 25 or 50 pairs, the proposal artificially inflates the cost of early entrants (usually a CLEC) in order to give later entrants (usually the ILEC) a less-expensive, indeed, free ride on entering that neighborhood.

d. Conclusion and Proposal.

SBC-Ameritech's proposed conditioning costs are patently absurd and unlawful. As described above, per loop conditioning costs are entirely inconsistent with TELRIC pricing methodology for unbundled loops. The Commission must keep in mind the impact of SBC-Ameritech's proposal: an entire class of customers *will be denied* competitive xDSL entry until the state commissions get around to "fixing" these charges. SBC-Ameritech's proposal provides for no "true-up" at a later date, so CLECs will be forced to turn away customers unfortunate enough to be served by one of these loops. As proposed, there is absolutely *no* public interest benefit to be gained by Paragraph 24 and Attachment C. Instead, Paragraph 24 and Attachment C would present a severe harm to

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[32] In a pending Covad/ACI Texas Arbitration against SBC's subsidiary, Southwestern Bell Telephone Company (SWBT), SWBT stated that when it deploys ADSL service, it will condition fifty pair binder groups at the same time. *See* SWBT Response to ACI Third Request for Information, Request No. 22, Tex. P.U.C. Docket Nos. 20226, 20272.

[33] Lee L. Selwyn, Patricia D. Kravtin & Scott A. Coleman, "Building a Broadband America: The Competitive Keys to the Future of the Internet," at 56-58, 68 (Economics and Technology, Inc. May, 1999).

the public interest by eliminating competitive entry to an entire class of consumers and by providing SBC-Ameritech with an excuse to amend current interconnection agreements that do not include such charges to impose these new charges. If the Commission accepts SBC-Ameritech's absurd rates, it would abandon (without administrative notice) its effective TELRIC pricing rules and would barricade entire neighborhoods and consumers from any competitive, xDSL entry.

The Commission must take one of two alternative steps. One option would be fore the Commission to: (a) reject Paragraph 24 in its entirety; (b) adopt in its place a statement reaffirming that the nonrecurring assessment of per-loop conditioning charges is inconsistent with a TELRIC pricing methodology, and (c) order SBC-Ameritech to provide conditioned, xDSL loops in a manner consistent with TELRIC. In the alternative, the Commission could modify Paragraph 24 to state that while the nonrecurring assessment of per-loop conditioning charges is inconsistent with a TELRIC methodology, for states that have not adopted a final TELRIC methodology for unbundled, xDSL-compatible loops, SBC-Ameritech must offer a uniform rate for conditioning those loops of $0. This "best practices" result would provide "uniformity" in the 13-State region with California and Michigan.

3. SBC-Ameritech's Proposed Electronic Access to Loop Pre-Qualification Information is Insufficient (¶¶ 21 and 23).

SBC-Ameritech have proposed to provide "theoretical loop length" information on a electronic, pre-order basis to CLECs. This information is not of much use to CLECs

that wish to determine on a pre-order basis what xDSL service a particular customer may receive.[34]

SBC's "theoretical loop length" information is just that – theoretical. Rather than actually assess the length of a loop, SBC estimates the "longest" length of one particular loop in an entire set of loops that run to a neighborhood. As a result, one 18,000 foot loop in a group of perhaps 100 loops causes *all* 100 loops in that group to be classified was having a "theoretical loop length" of "greater than 17,500 feet." Because binder group integrity is not generally maintained in ILEC networks,[35] there is not even any assurance that the group of 100 loops are even in the same binder group.

These facts result in a pretty faulty and overly conservative database – short loops are incorrectly given longer "theoretical" loop lengths. On the other hand, the database does *not* contain other information relevant to the provision of xDSL services, such as the presence of repeaters, digital loop carrier, or analog load coils. As a result, the information SBC-Ameritech proposes to provide is both over- and under-inclusive and is therefore of little utility to data CLECs like Covad.

Instead, Covad would much prefer to have read-only, direct access to SBC's LFACS (or equivalent) database, which does contain the loop make-up information. This is the database that is accessed by SBC engineers when they actually install an unbundled xDSL loop or SBC's retail ADSL service to a particular customer. The LFACS – while

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[34] The type of xDSL service varies by the loop length. DSL providers, including Covad, offer a menu of bandwidth options to customers (*e.g.*, 384 kbps synchronous, 1.1 Mbps synchronous, etc.). As a result, when a customer wishes to order a particular DSL service option, it is obviously important to be able to tell the customer before he or she places an order whether that customer can obtain this bandwidth.

[35] *See* Comments of Covad Communications Company, CC Docket No. 98-147, Affidavit of Anjali Joshi, Section II (describing binder group management).

not comprehensive database – contains a myriad of information of actual loop length, the presence of DLC, repeaters, bridged taps and load coils. Covad believes that it is precisely this type of access that FCC Staff intended data CLECs to have when the June 29 Conditions were released. As a result, Covad proposes that Paragraphs 21 and 23 be modified to require SBC-Ameritech to provide CLECs with direct, read-only access to LFACS or similar loop make-up databases at no charge.

4. Comments on other Structural Separation and Advanced Services Proposals

As described above, Covad strongly supports structural separation remedies as potentially the "ultimate" solution to the inherent discrimination issues involved in unbundling and collocation. However, Covad does believe that there are several loopholes in the SBC-Ameritech proposal that need clarification. These issues are discussed below.

a. All Advanced Services Must be Provided through the Affiliate (¶ 25)

This paragraph should clearly state that SBC-Ameritech "shall provide *all* Advanced Services through one or more affiliate(s)." In addition, the third sentence should clarify that transition of *interstate* Advanced Services to the affiliate (third sentence) should *not* be conditioned upon SBC-Ameritech receiving state approval of a certificate of public convenience and necessity for intrastate services.

b. Equipment and Customer Auctions Should Be Ordered to Ensure Compliance with Structural Separation Requirements (¶¶ 27-28).

Covad supports the strong, Section 272 requirements for the separate affiliate. In particular, Section 272(c) directly requires that SBC-Ameritech "must provide to

unaffiliated entities the *same* goods, services, facilities, and information to its Section 272 affiliate at the *same* rates, terms, and conditions."[36] The Commission has previously held that Section 272(b) precludes joint ownership by SBC-Ameritech and its affiliate of transmission and switching facilities, as well as land and buildings.[37] With the exception of allowing joint marketing and exclusive use of trademarks, the June 29 FCC Staff conditions clearly anticipate that these Section 272 separation would requirements would apply *in toto*, except as explicitly stated.

Unfortunately, that is not what SBC and Ameritech proposed on July 1. Instead, SBC-Ameritech want the ability to have the ILEC arm provide functionality of certain "advanced services equipment" to the separate affiliate "on an *exclusive* basis during a [6-month] transitional period" (¶ 27(c)). The ILEC may also transfer equipment to the affiliate on an "exclusive" basis during a six-month period (¶ 28).

Like SBC-Ameritech's desire to have its affiliate have "exclusive" access to DSL line sharing, these exclusivity proposals are fundamentally inconsistent with the concept of structural separation for advanced services. SBC-Ameritech are asking that the Commission bless special arrangements and favors between the SBC-Ameritech ILECs and the separate advanced services affiliate.

If the Commission deems it appropriate to permit SBC-Ameritech to transition certain equipment and customers between the two entities, it should not permit there to be *any* exclusivity associated with that transfer. In fact, the Commission should consider having the ILEC host an auction of the existing "in place" advanced services equipment

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36 47 U.S.C. § 272(b) (emphasis added).

37 *Section 272 Non-Accounting Safeguards Order*, 12 FCC Rcd at 21981-82.

and customers on a state-by-state basis. Such an auction would accomplish three public interest objectives –

First, an auction it would ensure that ratepayers of the ILEC arm not be forced to pay for Advanced Services Equipment procured by the ILEC arm utilizing funds from a captive rate base, only to have that equipment transferred at no charge to the unregulated affiliate in the next six months.[38] Holding an auction of ILEC-arm Advanced Services equipment and customers would ensure that the regulated ILEC-arm of SBC-Ameritech be fully compensated for the value of the Advanced Services Equipment and customer base that the ILEC has grown.[39]

Second, the auction would ensure that *all* rival advanced service providers – including the SBC-Ameritech separate affiliate – would have an equal and nondiscriminatory access to these equipment and customers.

Third, the equipment transfer policy would ensure the legality of considering the separate advanced services affiliate as not the "successor or assign" of the SBC-Ameritech ILECs. This is an important point because in the last sentence of Paragraph 28, SBC-Ameritech have expressly stated that if its equipment-transfer policy does not meet this legal threshold, the entire separate affiliate obligations of these conditions expire. Covad believes that its auction proposal would help ensure that the SBC-

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[38] Indeed, as Covad interprets Paragraph 28, there is *no* prohibition on SBC and Ameritech from having their ILEC arm purchase as much Advanced Services Equipment as possible during the 6-month "Grace Period" and then transfer *all* of that equipment to the unregulated affiliate at the very end of this Grace Period. Equipment procured during this period could support SBC-Ameritech xDSL build-out for several years.

[39] State-by-state auctions would facilitate the proper imputation to the corresponding SBC-Ameritech state subsidiary ILEC.

Ameritech separate advanced services affiliate not be deemed an "incumbent LEC" under the Act.

c. Integrated Provision of Services Pending State Approval Must be Strictly Limited (¶ 30)

SBC-Ameritech's Paragraph 30(d) contains a significant loophole. As proposed, Paragraph 30(d) would permit SBC-Ameritech to provide interstate Advanced Services (such as DSL) on an integrated basis if a State does not provide a necessary approval to SBC-Ameritech. Covad believes that this loophole could lead SBC-Ameritech to delay the State approval process, so that it can build up a customer base by providing DSL line sharing to itself on an integrated and exclusive basis, and then transfer those customers and equipment to the advanced services affiliate once State approvals are received. This loophole would grant SBC-Ameritech a large competitive advantage during this interim time period.

One means of closing this loophole would be for the Commission to issue final DSL line sharing rules in CC Docket No. 98-147 as soon as possible, as described above. In the alternative, the Commission could regulate SBC-Ameritech's integrated offering as an ILEC service and prohibit SBC-Ameritech from utilizing any form of DSL line sharing on an integrated basis until its Advanced Services affiliate has received the necessary approvals.

d. OSS Discounts for Advanced Services should be more Clearly Defined (¶ 35).

Covad supports the proposal in Paragraph 35 that data CLECs like Covad be given a "discrimination discount" as long as they use OSS that the incumbent LEC need not use to provide retail services. Covad believes that a "separate" CLEC-only OSS will

never be "equal" to that which the ILEC uses retail operations. In particular, the creation, design and maintenance of a "CLEC-only" OSS system creates rife opportunities for tacit, non-price forms of discrimination by the ILEC that no regulatory body can realistically police.

For instance, it is very difficult for a regulator to adequately police an ILEC's dedication of quality resources to OSS development. The only way to ensure that such decisions are made properly is to require that ILEC retail operations utilize the same interfaces that CLECs use. Paragraph 35 is a step in this direction but should be tightened, in Covad's opinion.

In particular, Covad would like the Commission to put further definition on the term "substantial majority" and also state clearly that the Commission will determine, upon application by SBC-Ameritech, when a the separate affiliate has used the improved OSS for a "substantial majority" of its orders "in the relevant geographic area." Covad is concerned that without defining those terms, SBC-Ameritech will take it upon themselves to interpret those terms and immediately begin to increase rates in certain areas simply by giving notice to CLECs.

Covad proposes the following procedure:

- SBC-Ameritech may file applications with the Commission to be relieved of the 25% rate discount on a state-by-state basis
- A "substantial majority" means that no fewer than 75% of the affiliate's orders (minimum 5000) in the prior six months in that state were placed through the xDSL/Advanced Services OSS

- Limited discovery would be granted to CLECs and the Commission to ensure that those orders had indeed been placed through the OSS and were processed like any other CLEC order
- A Commission decision would be issued in 6 months; if the Commission agrees with SBC/Ameritech, the 25% discount would no longer be applied to new orders placed by CLECs in that state.
- The condition should ensure that the Advanced Services affiliate continue to utilize increasingly the CLEC OSS. The Advanced Services affiliate would be required to report every six months the number of orders it placed through the CLEC OSS and to prove that the percentage of those orders placed through the CLEC OSS was greater than the percentage in the previous period. In the event the affiliate's percentage use of the CLEC OSS declined in a six month period, the 25% "discrimination discount" would be available to CLECs until the affiliate once again met its prior percentage threshold for a six month period.[40]

e. The Commission Should Affirm Intent to Enforce Imputation, Discrimination and Cross-Subsidization Requirements on SBC-Ameritech ILEC/Affiliate Relationship (¶ 36)

The Commission should make it clear that although the affiliate would be regulated on a non-dominant basis, the Commission would still enforce its imputation,

[40] For example, if the affiliate placed 80% of orders through the CLEC OSS in the first half of 2000 but in the second half of 2000 placed only 76% of orders through the CLEC OSS, the 25% discrimination discount would apply until the affiliate demonstrated that it placed 80% of its orders during a six month period through the CLEC OSS. This proposal ensures that the affiliate *continue* to use the CLEC OSS.

discrimination and cross-subsidization policies. In particular, Covad urges the Commission to ensure that the advanced services affiliate actually be charged the actual costs of line sharing, collocation, and elements ordered by that affiliate. Tariff investigations may be the most effective means of ensuring that such imputation happens.

f. All Conditions Should Apply to Subsequent SBC Acquisitions (¶ 38)

Covad supports Paragraph 38, which states that the separate affiliate conditions "shall automatically apply to any other domestic incumbent LEC that merges with or is acquired by SBC/Ameritech." Indeed, Covad is curious as to why the *rest* of the July 1 Proposal does not contain a similar proposal.

5. Summary of Covad Position on Advanced Services Proposals

As described above, Covad believes that the FCC Staff's separate affiliate proposal – if implemented properly – would have significant public interest benefits. Unfortunately, SBC-Ameritech has proposed contingencies and exclusive arrangements around the edges of this proposal that mitigate many of these public interest benefits. In several areas – such as the "exclusive" access of the separate affiliate to DSL line sharing, the proposal to impose $1500 per-loop conditioning charges on CLECs, and the proposal that the separate affiliate receive "exclusive" transfers of existing SBC-Ameritech equipment and customers – the SBC-Ameritech proposal would embed and extent substantial competitive advantages to its separate affiliate in the market for advanced services.

Covad has proposed several steps that would restore the public interest benefits of the separate affiliate proposal. Perhaps the most important immediate action the Commission can take to ensure the public interest benefits of the separate affiliate

proposal would be to issue final DSL line sharing rules in CC Docket No. 98-147 prior to or on the date an order is entered in this merger proceeding. Rather than dealing with complicated "interim" periods that, as proposed, would grant a substantial competitive advantage to SBC-Ameritech DSL services, the Commission can eliminate or reduce the harm caused by any such interim period simply by taking the bull by the horns by implementing final DSL line sharing rules in CC Docket No. 98-147.

G. Compliance with Commission Pricing Rules (Proposed Condition X)

Covad supports the proposal in Paragraph 43 and applauds the Commission for taking enforcement of its UNE pricing rules seriously. That said, Covad believes that Paragraph 44 should not carry much "public interest" weight.

In particular, it is already the duty of the Commission to enforce its rules and SBC's and Ameritech's obligation to comply with those rules, SBC-Ameritech cannot be given any "public interest credit" for permitting the Commission to enforce the rules. Indeed, Covad believes that if the Chief of the Bureau provided notice to *any* ILEC *today* of the Chief's concerns about compliance with the rules in a particular state, that ILEC would promptly provide the Bureau "documentation addressing those concerns" and would "take all necessary steps to comply with the Commission's pricing rules in effect at that time . . ." (¶ 44).

As a result, Covad does not see much in the "process" set forth in Paragraph 44 that should not already be happening today. While Covad is pleased that SBC-Ameritech finally now seem willing to permit the FCC into this process, from the perspective of the Commission, this concession should not hold much public interest weight.

Covad also notes the striking inconsistency between Paragraph 44 and Paragraph 24/Attachment C. As discussed above, in Paragraph 24/Attachment C, SBC-Ameritech request the Commission to bless the imposition of per-loop, actual cost conditioning charges upon the provision of unbundled, xDSL loops. As Covad describes in Section II.F.2 above, imposition of those per-loop charges is fundamentally inconsistent with TELRIC pricing for unbundled loops.

H. Carrier-to-Carrier Promotions (Proposed Condition XI)

As a provider of advanced services, Covad is not benefited by the carrier-to-carrier promotions contained in Paragraphs 45-49 and therefore chooses not to comment on them at this time.[41] Indeed, these promotional programs are explicitly discriminatory and favor one form of entry (circuit-switched, voice-grade residential service) over other forms of entry (in particular, packet-switched, advanced services).

Covad is also concerned with the severe limitations SBC-Ameritech have placed on these promotional offerings and the fact that SBC-Ameritech have retained the right to audit at will any CLEC that does participate in this program. The ability to audit a participating CLEC's network and operations at any time could have a substantial chilling effect. These arbitrary, audit-on-demand restrictions will have a disparate impact on smaller CLECs (more apt to focus on underserved markets) that do not have staff to address these audits.

I. Alternative Dispute Resolution (Proposed Condition XII)

Covad supports the ADR proposal set forth in Paragraph 50 and Attachment E as an alternative means of resolving CLEC-ILEC disputes. It is critical that this ADR

[41] These promotions are explicitly not for Advanced Services uses of unbundled loops. ¶ 46(e)(i).

process only is available at the CLEC's election – which prevents the ILEC from forcing a CLEC to participate in endless "mediation" prior to a more formal procedure. As described in Paragraph 50 and Attachment E, the CLEC would be free to utilize any dispute resolution mechanism at its option – be they the Commissions, state commissions, this new ADR process, or the court system.

Covad has two suggestions to improve the process described in Attachment E.

First, the process should permit multi-state mediations of similar or common issues. The ADR process rightly states that SBC-Ameritech will "attempt to resolve issues affecting multiple CLECs in the same State through consolidated mediations" (Attachment E, subparagraph c) but does not contemplate multi-state mediations. If a particular issue arise in one state – such as those relating to OSS availability, UNE provisioning processes, etc. – that issue is likely to pop up in other states.

Covad believes that multi-state mediations of the same issue would greatly advance competition in smaller, less-densely populated states in the SBC-Ameritech region, such as Kansas, Oklahoma, Wisconsin and Nevada. CLECs are more likely to request mediation in larger states first – simply because the number of access lines at issue in larger states makes it more cost-effective to resolve those disputes in larger states first. On the CLEC's request, however, other states should be permitted to participate in resolving the same dispute, and SBC-Ameritech should accommodate that request.

Second, Attachment E should propose a contingency in the event a state commission fails to appoint a mediator. In a single-state mediation, Covad suggests that

the Chief of the FCC Common Carrier Bureau take the place of the state commission in the process of Attachment E and designate a mediator.[42]

J. Most Favored Nation Provisions (Proposed Condition XIII)

As proposed by SBC-Ameritech, the proposal of Paragraph 52 (In-Region Agreements) should be given little, if any public interest weight. SBC-Ameritech have only promised to "make available" an "interconnection arrangement or UNE" (exclusive of price) that was "voluntarily negotiated by SBC" in an agreement "approved after the Merger Closing Date." SBC-Ameritech explicitly state that they will not be obligated to "make available to a requesting telecommunications carrier any terms for interconnection arrangements or UNEs that incorporate a determination reached in an arbitration . . . ."

The caveat embedded in this offer is so littered with so many caveats as to make it virtually useless to CLECs. The ostensible purpose of these "MFN" proposals are to speed up the interconnection-agreement negotiation process for CLECs by leveraging "best practices" in some SBC/Ameritech states into other states. Such MFN availability would, in theory, speed entry.

The SBC-Ameritech proposal would not accomplish this goal, principally because it would not provide "arbitrated" terms of in-region agreements to other states. Since most of the core, important issues regarding UNE access and collocation have been or will be arbitrated, the restriction of this proposal to only "voluntary" terms renders this commitment virtually meaningless.

SBC-Ameritech has made virtually the same proposal in the pending Illinois Commerce Commission review of this merger, and Covad argued there that this

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[42] In a multi-state mediation (proposed by Covad above), the lack of participation by one state

condition should be modified to require that arbitrated methods, terms and conditions be available in other states, subject to state-by-state pricing. Attachment 2 is a copy of the argument Covad submitted in the ICC proceeding on this very point. Attachment 2 describes Covad's position and counterproposal, arguing that –

- The proposed condition could actually work against the public interest because it would *discourage* SBC-Ameritech from resolving issues voluntarily and actually *encourage* SBC-Ameritech to arbitrate even *more* issues region-wide. This is because the fact of arbitrating an issue would prevent its application in other SBC-Ameritech states pursuant to this MFN condition.
- Covad's proposed alternative – in which arbitrated terms would be available region-wide – would promote entry throughout SBC-Ameritech region because it would leverage particular areas of state expertise region-wide. For example, the current Covad/ACI arbitration in Texas touches upon the methods in which SBC will deploy ADSL and DSL OSS region-wide; it would be detrimental to competition to require CLECs to re-arbitrate those issues in twelve other states.

Finally, the SBC-Ameritech offer would not operate to take existing voluntary Ameritech practices and transport them to SBC states. Only terms "voluntarily negotiated by SBC" in-region will be made available in other in-region states. As a

commission should not stall the applicability of the result of that mediation in that particular state.

result, any pro-competitive method of access that Ameritech has already voluntarily agreed in the existing Ameritech region will not be available to CLECs in the SBC region.

K. Regional Interconnection and Resale Agreements (Proposed Condition XIV)

Neither SBC nor Ameritech currently will provide regional interconnection agreements with state-specific pricing attachments.[43] Both of these RBOCs insist that separate, state-by-state agreements be negotiated, either concurrently or sequentially.[44] The impact of these policies are to slow entry in both the SBC and Ameritech regions.

Paragraph 53 tries to address this issue and speed entry but breaks down as long as SBC-Ameritech can refuse to offer arbitrated methods, terms and conditions pursuant to Paragraph 52. Indeed, without Covad's proposed change to Paragraph 52, the proposed SBC-Ameritech "regional" agreement required by Paragraph 53 will only contain SBC-Ameritech's preferred "voluntary" (read that, pro-ILEC, anti-competitive) terms.

Once a CLEC attempts to change one of those "voluntary" terms in the regional agreement on the basis of a recent arbitration decision in one or other covered states, SBC-Ameritech will no doubt claim that if the CLEC wants that arbitrated provision, it will have to negotiate separate agreement for those states. Once the Commission realizes that the method, terms and conditions of access to fundamental unbundled network

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[43] BellSouth does provide, upon request, such regional agreements.

[44] For instance, earlier this month, SBC informed Covad that it would not negotiate a regionwide-agreement covering Missouri, Oklahoma, Kansas and Arkansas but instead wished to proceed with four "generic agreements" that are "for the most part" uniform.

elements such as loops and collocation have been arbitrated in many states, Covad believes these "regional" negotiations would break down fairly rapidly.

Rather than tipping negotiating power in favor of the CLEC, the CLEC's sole source of bargaining power would be to initiate 13 state arbitrations simultaneously. And once that action is taken, all the benefits of a "regional" agreement (specifically, lower transaction costs and swifter CLEC entry) will be lost.

There is a better way to adopt "best practices" in regional interconnection agreements that would reduce transaction costs and speed entry. If the Commission accepts Covad's proposal for Paragraph 52 that any method, term or condition for interconnection or access to unbundled elements offered by SBC-Ameritech in one state (be it an arbitrated method, term or condition or not) must be offered by SBC-Ameritech in another state, the regional interconnection agreement process described in Paragraph 53 would indeed speed entry. CLECs would be able to choose and incorporate SBC-Ameritech regional "best practices" in these regional negotiations and SBC-Ameritech would be limited in its ability to require the CLEC to begin 13 separate state arbitration proceedings in order to enforce its rights pursuant to the proposed merger conditions.

The resulting situation would tip bargaining power away from the ILEC in regional negotiations. The CLEC would be able to pick-and-choose among a region-wide menu of methods, terms and conditions. SBC-Ameritech would not be able to force a CLEC to re-arbitrate issues that have already been resolved in another state. Each state commission would retain the ability to review the final agreement pursuant to Section 252.

Absent Covad's proposed change to Paragraph 52, Covad does not believe that Paragraph 53 should carry much public interest weight.

L. Covad Performance Bond Proposal/Verification of Compliance (Proposed Condition XXII)

FCC Staff is to be applauded for their continued focus on enforcing ILEC compliance with the market-opening provisions and regulations of the 1996 Act. Covad hopes that the Commission will similarly take its obligation to enforce these SBC-Ameritech merger conditions seriously and will expeditiously utilize its expedited dispute resolution process to ensure compliance with these conditions. In that regard, Covad proposes a few changes to Proposed Condition XXII that Covad believes will substantially strengthen enforcement of these conditions.

1. The Commission Should Require SBC-Ameritech to Post a $1 Billion Bond to Ensure Compliance

Although the compliance and audit process proposed in Paragraph 62 may assist the Commission in rooting out violations of these conditions, the Commission should require SBC-Ameritech to post a substantial performance bond ($1 billion) to ensure compliance with these conditions and the interconnection and unbundling provisions of the Act and Commission rules.

Several parts of the July 1 submission propose that SBC-Ameritech make substantial monetary payments in the event of non-compliance. The $1 billion bond would ensure the prompt payment of violations of the federal performance parity plan, the OSS enhancements and interfaces, out-of-region competitive entry, etc. The bond would also promote the public interest by being available to bolster enforcement activity. For example, interest on the bond could be used to fund the periodic independent auditor

reviews of compliance, arbitrators and mediators used pursuant to the ADR process (Attachment E) or in the OSS enhancements and interfaces (Condition III), and Commission and state commission enforcement activity. Interest also could be used to support public interest programs.

Covad does not believe that a $1 billion bond would pose a substantial long-term burden on SBC-Ameritech. The bond represents less than 25% of the potential amount of payments SBC-Ameritech have already willingly accepted pursuant to these proposed conditions. If SBC-Ameritech does indeed comply with these conditions, the $1 billion bond would be returned when all of the conditions expire. Given SBC's claims of multi-billion dollar efficiencies from this merger, posting this bond should not pose a long-term burden on SBC-Ameritech.

2. The Paragraph 62 Verification Process should be Open to Public Review

Like the collocation compliance audit (*see* Section II.B above), the compliance audit described in Paragraph 62 should be more open to public scrutiny. Covad believes that independent compliance audits could generate public interest benefits, provided that the audit is open and that the Commission swiftly utilizes the results of an unfavorable audit to impose fines and forfeitures on SBC-Ameritech for noncompliance.

Covad's principal issue with the compliance program (¶ 62(d)) is that the audit would be conducted in secret, that participation by CLECs in the audit process will be at the sole discretion of the auditor, and that no penalties, fines or forfeitures appear to be contemplated in the event the audit finds that SBC-Ameritech are not in compliance with the conditions collocation rules.

a. The SBC-Ameritech Plan for Compliance Should be Filed Prior to Approval and be Made Public.

Paragraph 62(b) states that SBC-Ameritech will, within 60 days of the Merger Closing Date, file a "confidential" plan for compliance.

The Commission is to credited for the public and open manner in which it has treated this merger review process. The Commission has a public interest mandate in this proceeding – as a result, the business of the Commission is the people's business. But now SBC-Ameritech wants to shut the door on public scrutiny of its plan for compliance. The Commission should not permit this to happen and should make SBC-Ameritech's plan for compliance with these conditions must be made public. What possible reason can justify SBC-Ameritech's claim of confidentiality over their plan to implement these merger conditions?

In addition, the compliance plan should be submitted to the Commission *before* the merger is approved. Once the merger has closed, it will be difficult for the Commission to "unscramble the egg" if it finds the compliance program to be inadequate.

b. The Annual Audit Process should include Public Review

SBC-Ameritech's compliance with these merger conditions is highly important to the public interest. For this reason, the work plan, interim results, and final results of the independent auditor should be open to public scrutiny. Unfortunately, SBC-Ameritech's proposal would keep the audit requirements, results and findings of this audit a complete secret until the final report is issued.

An open audit process, in which the work plan, audit requirements and interim findings are open for review at periodic stages will best ensure that this audit works to ensure compliance. Covad recommends that –

- Paragraph 62(d)(1) be amended to provide the opportunity for public comment on the preliminary audit requirements and that the Commission be given the ability to approve or reject the requirements of the audit or changes to the audit requirements.
- Paragraph 62(d)(2) should require the auditor to file a set of interim findings eight months after the initiation of the audit, on which the Commission should seek public comment. Release of interim findings will facilitate an open process so that CLECs may be ensured that their particular issues may be addressed by the audit prior to filing the final report.
- Paragraph 62(d)(7) should permit public access to the working papers and supporting materials of the auditor (subject to appropriate protective order).

III. CONCLUSION

It is easy to get mired in the minutae of the one-hundred page SBC-Ameritech July 1 proposal and miss several critical points. In many areas, the conditions originally released on June 29 by FCC Staff – if faithfully implemented – represent significant steps forward in the development of competition. In particular, the advanced data services affiliate and focus of other provisions upon the competitive provision of advanced services could, Covad believes, advance the deployment of competitive broadband services to American consumers.

However, as SBC-Ameritech have formally represented these proposed conditions, many of the proposals become "rainbow" promises – when you look at them closely, they do not become any clearer and sometimes disappear entirely. For example, the timetables surrounding the promised OSS "enhancements" as so strung out that, as shown in Attachment 1 to these Comments, SBC-Ameritech's obligation to provide those "enhancements" will expire shortly after they are made available. In addition, SBC-Ameritech's offer to negotiate regional interconnection agreements that have "MFN" clauses of "voluntary" terms sounds nice – but until one realizes that most substantive clauses of methods, terms and conditions of interconnection and access have been arbitrated, this rainbow promise fades to nothingness.

Some other SBC-Ameritech "feel good" rainbow promises could, when looked at closely, actually be harmful to the public interest. Although the June 29 Conditions clearly said that the SBC-Ameritech ILECs will treat the advanced services affiliate "as they would any" CLEC, scrutiny of SBC-Ameritech's Paragraph 34 reveals that the advanced services affiliate will have "*exclusive*" access to DSL line sharing from the SBC-Ameritech ILECs for an indeterminate period of time. Giving the separate affiliate *any* method of access on an exclusive basis for any period of time is fundamentally inconsistent with the purpose of structural separation for advanced services. This period of exclusivity would give the separate affiliate a competitive advantage over data CLECs like Covad – especially with regard to serving households where no facilities for a stand-alone second line for data services exists.

Some of these rainbow conditions promise a pot of gold at their end. But like Irish legend, the pot of gold of course proves elusive. For example, Paragraph 18 –

where SBC-Ameritech's ostensibly commits to provide CLECs with OSS at "no charge" but which in reality would permit SBC-Ameritech to charge for this OSS through UNE rates and other unspecified means.

And like Dorothy, sometimes we discover that the land "over the rainbow" it is worse than the place from which we departed. Take, for example, Paragraph 24/Attachment C. Here, SBC-Ameritech offer "uniform" nonrecurring rates of over $1500 for conditioning an xDSL loop. In several SBC and Ameritech states, no charges are assessed for conditioning those loops, a result consistent with the Commission's TELRIC pricing rules. Commission acceptance of this proposal would have the Commission turn its back on TELRIC pricing of digital loops. Acceptance of this proposal also would provide SBC-Ameritech license to impose $1500-per loop charges region-wide, even where such per-loop conditioning charges are not assessed today.

Throughout these one hundred pages of verbiage and legalese, SBC-Ameritech have taken the June 29 FCC Staff conditions and transformed them into something quite different. Covad has provided dozens of suggestions above to help fix some of the key problems it has detected with the July 1 proposals; other interested parties will no doubt present other meritorious suggestions.

However, based upon SBC-Ameritech's demonstrated pattern of resisting competition and its attitude towards the regulatory process (see Section I.C above), Covad also urges that the Commission, (1) adopt final DSL line sharing rules in CC Docket No. 98-147 prior to or on the same date as an order in this merger proceeding (to avoid the competitive issues surrounding the "interim" line sharing solution proposed by SBC-Ameritech); and (2) require SBC-Ameritech to post a $1 billion bond to ensure

compliance with these conditions. Only by taking these actions will the Commission be assured that the promises of the proposal actually translate into public interest benefits.

Respectfully submitted,

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